IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
vs.	)	No. CR23-36 CJW
	)	
ALEXANDER WESLEY LEDVINA,	)	Defendant's Motion to Dismiss Indictment
	)	
Defendant.	)	

The Defendant, Alexander Ledvina, moves the Court, pursuant to Federal Rules of Criminal Procedure 12(b)(3)(B), to dismiss the Indictment, which charges possession of a firearm while being an unlawful user of marijuana, in violation of 18 U.S.C. § 922(g)(3); and False Statement during Purchase of Firearm, in violation of 18 U.S.C. § 924(a)(1)(A).

The Court should dismiss the Indictment because § 922(g)(3) is unconstitutionally vague in violation of the Due Process Clause of the Fifth Amendment. The statute fails to give ordinary people fair notice of the conduct it punishes because it does not define the term "unlawful user." Thus, a citizen must guess at what point he or she, after unlawfully using a controlled substance, may lawfully possess a firearm.

The statute is also unconstitutional in light of the U.S. Supreme Court's recent ruling in *New York State Rifle and Pistol Association v. Bruen*, 142 S. Ct. 2111

(2022). The restriction contained in § 922(g)(3) prohibits possession of a firearm for any person "who is an unlawful user of or addicted to a controlled substance." Because the Government cannot demonstrate that prohibiting such conduct is consistent with the Nation's historical tradition of firearm regulation, the Indictment must be dismissed.

A separate brief in support of the motion is attached.

Respectfully submitted,

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I certify that on this 31st day of July, 2023,
the foregoing was filed via CM/ECF and
copies were then sent to all parties of record.
/s/ Michael K. Lahammer

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

UNITED STATE OF AMERICA,	)	
	)	**Case # CR23-36 CJW**
Plaintiff,	)	
	)	**BRIEF IN SUPPORT OF MOTION TO**
	)	**DISMISS INDICTMENT BASED ON**
v.	)	**THE UNCONSTITUTIONALITY OF**
	)	**TITLE 18 USC §922(G)(3)**
	)	
ALEXANDER WESLEY LEDVINA,	)	
	)	
Defendant.	)	

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INTRODUCTION

The Defendant, Alexander Ledvina, moves the Court, pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B), to dismiss the Superseding Indictment (Dkt. 33), which charges possession of a firearm while being an unlawful user of marijuana, in violation of 18 U.S.C. § 922(g)(3) (Count 1), and False Statement during Purchase of Firearm, in violation of 18 U.S.C. § 924(a)(1)(A) (Count 2). The key averment in Count 1 is that the Defendant allegedly knew that he was an "unlawful user" of marijuana and cocaine while in possession of a firearms. The key averment in Count 2 is that the Defendant allegedly knowingly made a false statement that he was not an "unlawful user" of controlled substances in connection with his acquisition of a firearm.

The Court should dismiss the Indictment because § 922(g)(3) is unconstitutionally vague on its face in violation of the Due Process Clause of the Fifth Amendment. The statute fails to give ordinary people fair notice of the conduct it punishes because it does not define the term "unlawful user." Thus, a citizen must guess at what point he or she, after unlawfully using a controlled substance, may lawfully possess a firearm.

The statute is also unconstitutional in violation of the Second Amendment in light of the United States Supreme Court's recent ruling in *New York State Rifle and Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022). The restriction contained in § 922(g)(3) prohibits possession of a firearm for any person "who is an unlawful user of or addicted to a controlled substance." Because the Government cannot demonstrate that prohibiting such conduct is consistent with the Nation's historical tradition of firearm regulation, the Indictment must be dismissed.

This Court recently addressed similar issues in *United States v. Owens*, No. 23-CR-22-CJW-MAR (Dkt. 24, filed May 22, 2023). This Court's reasoning in *Owens* is addressed in the argument below.

ARGUMENT & AUTHORITY

Title 18, U.S.C., § 922(g)(3) provides:

> (g) It shall be unlawful for any person—
>
> . . .
>
> (3) who is an unlawful user of or addicted to any controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802));
>
> . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

Section 922(g)(3) is unconstitutional for two reasons, First, the statute violates the Due Process Clause of the Fifth Amendment because the statute is so vague on its face that it fails to provide fair notice of the acts prohibited and allows for arbitrary and discriminatory enforcement. Second, § 922(g)(3) violates the Second Amendment because historical traditions do not support prohibiting persons who are accused of being a "user of" or "addicted to" a controlled substance from possessing firearms.

I. Section 922(g)(3) Violates Mr. Ledvina's Due Process Rights because the Statute is Unconstitutionally Vague on Its Face[1]

Section 922(g)(3) prohibits possession of a firearm where an individual is found to be "addicted to" or an "unlawful user of" a controlled substance. However, the statue itself fails to define what it means to be an addict, or one who unlawfully uses a controlled substance, thereby creating several vagueness problems.

The Fifth Amendment provides that "[n]o person shall ... be deprived of life, liberty, or property, without due process of law." U.S. CONST., amend. V. Courts have long held that "the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague, that it fails to give ordinary people fair notice of the conduct it punishes or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 596 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-358 (1983)). In addition to violating due process guarantees, vague laws contravene the basic tenet of the separation of powers doctrine. *U.S. v. Davis*, 139 S. Ct. 2319, 2325 (2019) (affirming that vague laws allow "relatively unaccountable police, prosecutors, and judges," rather than elected representatives, to define the law thereby undermining "democratic self-governance"); *see also Kolender*, 461 U.S. at 358 ("[I]f the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, [it would] substitute the judicial for legislative department"). Thus, where a law is so vague it violates a defendant's due process rights, "the role of courts under our constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again." *Davis* at 2323.

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1 Mr. Ledvina does not presently make an as applied challenge to the unconstitutional vagueness of the statutes at issue at this time. An as applied challenge can be decided only after presentation of evidence at trial and cannot be decided on a motion to dismiss. *See United States v. Turner*, 842 F.3d 602, 605 (8th Cir. 2016); *United States v. Stupka*, 418 F.Supp.3d 402, 405 (N.D. Iowa 2019). Mr. Ledvina reserves the right to make an as applied challenge at trial in the event this Motion to Dismiss is denied.

In *Owens*, this Court found that § 922(g)(3) does not infringe upon a fundamental right. That conclusion is not consistent with the Supreme Court's view in *McDonald*, *Heller* and *Bruen*, discussed below, that possession of a firearm is a fundamental right under the Second Amendment. *See Owens*, slip op. at 12.

a. Section 922(g)(3) is facially void because the text is ambiguous.

Congress' decision not to define the key terms within § 922(g)(3) renders the statute facially invalid because it fails to provide individuals of common intelligence notice as to whether they fall within its proscribed class. As written, § 922(g)(3) must be stricken as facially void-for-vagueness. *See, United States v. Morales-Lopez*, No. 2:20-CR-00027-JNP, 2022 WL 2355920, at *8 (D. Utah June 30, 2022).

While the statute does reference a definition of "controlled substance," it provides no such definition for the terms "addicted to" or "unlawful user." "In interpreting statutes, it is the duty of the court to give effect, if possible, to every clause and word of a statute." *Morales-Lopez* at 8. "Here the legislature included two categories of individuals covered by the statute." *Id.* "Thus, the court must give independent meaning to unlawful user and a person addicted to a controlled substance." *Id.*

The term "addict" is defined as: (1) "one exhibiting a compulsive, chronic, physiological or psychological need for a habit-forming substance, behavior, or activity," or (2) one strongly inclined to do, use, or indulge in something repeatedly." *See* Miriam-Webster.com (2022) (definition of "addict"). However, the statute does not establish when a behavior becomes compulsive or chronic, or how an individual prosecutor, judge, or jury, will determine when a behavior, or activity, has become a physiological or psychological need or habit. Also, the statute

fails to clarify exactly what the government must prove. Must there be some overt act or is an attempt sufficient? Is the inclination to use a substance without action enough to deprive one of their constitutional rights? Similarly, how can a defendant know if they are "strongly inclined" to do, use, or indulge in something repeatedly without further clarification? What about a recovering addict, *i.e.*, a person who received a diagnosis of addiction in the past, but who has been or is in treatment and has been substance free for months or years?

Turning to the term "user," it must be something less than an addict. *Morales-Lopez* at 8. The dictionary simply defines the term as: "one who uses." *See* Miriam-Webster.com (2022) (definition of "user"). Section 922(g)(3), therefore, prohibits firearm possession by one who unlawfully "uses" a controlled substance, but does not clarify if there are any temporal constraints on when such use took place. Thus, on its face, the statute would prohibit anyone who has ever unlawfully used a controlled substance from possessing a firearm. Without a temporal link or defined threshold for determining when the prohibited status begins, individuals are left to read § 922(g)(3) with the understanding that "once a user, always a user."

In *Morales-Lopez*, the District Court stated, "this court finds an interpretation that would make gun possession at any point in a person's life after a single instance of ingesting drugs absurd." *Id*. at 8. In assessing the constitutionality of § 922(g)(3), the Seventh Circuit noted unlawful drug users "could regain [their] right to possess a firearm by simply ending [their] drug abuse." *United States v. Yancey*, 621 F.3d 681, 696 (7th Cir. 2010). The Fourth Circuit has concluded, "[s]ection 922(g)(3) does not forbid possession of a firearm *while unlawfully using* a controlled substance. Rather the statute prohibits *unlawful users* of controlled substances…from possessing firearms. *See United States v. Jackson*, 280 F.3d 403, 406 (4th Cir. 2002). Moreover, several circuits, including the Fifth, have rejected such an expansive interpretation of § 922(g)(3)

recognizing that a temporal nexus must be read into the statute to avoid rendering it unconstitutional. See *United States v. Patterson*, 431 F.3d 832, 839 (5th Cir. 2005) (upholding § 922(g)(3) against an "as applied" vagueness challenge) (citing *United States v. Turnbull*, 349 F.3d 558, 561 (8th Cir. 2003) (citations omitted)). Thus, the plain language of the statute renders § 922(g)(3) unworkable because it subject to multiple interpretations each more problematic and ambiguous than the last.

Turning to the context of the broader statute, the vagueness concerns of § 922(g)(3) are compounded. Unlike § 922(g)(1) (possession of a firearm by a felon) or § 922(g)(4) (possession of a firearm by one adjudicated as a mental defective or who has been committed to a mental institution), § 922(g)(3) has no adjudication requirement or prerequisite of a discrete act, such as commitment to an institution, prior to receiving the restricted status. Without a discernible threshold for when one obtains the status "addict" or "unlawful user of" a controlled substance, it cannot be said that the statue is unambiguous, nor does it provide an ordinary person notice of the statutory proscriptions.

Likewise, Congressional intent sheds no light on the ambiguities. The legislative record indicates that "the principal purpose of the federal gun control legislation… was to curb crime by keeping firearms out of the hands of those not legally entitled to possess them because of age, criminal background, or incompetency." *Huddleston v. United States*, 415 U.S. 814, 824 (1974) (quoting S. Rep. No. 1501, 90th Cong., 2d Sess., 22 (1968). U.S.Code Cong. & Admin. News 1968, p. 4410; *see also*, Congressman Celler, the House Manager, 114 Cong. Rec. 13647, 21784 (1968) ("No one can dispute the need to prevent drug addicts, mental incompetents, persons with a history of mental disturbances, and persons convicted of certain offenses, from buying, owning, or possessing firearms. This bill seeks to maximize the possibility of keeping firearms

out of the hands of such persons."). Subsequent legislative history of § 922(g)(3), however, is telling. Since its passage, Congress has amended § 922(g)(3) several times but at no time has it clarified what it means to be "addicted to" or "an unlawful user of" the prohibited substance(s). *See e.g.*. H.R. REP. 99-495, 99th Cong., 2d Sess., 14, 1986 U.S.C.C.A.N. 1327, 1340 (expanding the list of substances prohibited under § 922(g)(3)); H.R. REP. 91-1549, 91st Cong., 2d Sess., 1970 U.S.C.C.A.N. 4007, 4011(prohibiting the sale of explosives to "drug addicts"). Congress did, however, provide guidance under the National Instant Criminal Background Check System Improvement Amendments Act of 2007 in which it stated that a record, for purposes of § 922(g)(3):

> identifies a person who is an unlawful user of, or addicted to a controlled substance (as such terms "unlawful user" and "addicted" are respectively defined in regulations implementing section 922 (g)(3) of title 18, United States Code, as in effect on the date of the enactment of this Act) as demonstrated by arrests, convictions, and adjudications, and whose record is not protected from disclosure to the Attorney General under any provision of State or Federal law.

H.R. REP. 115-437, 20. Though this, too, fails to supply a definition for what it means to be a "addicted to" or "an unlawful user of" a controlled substance, Congress has, at the very least, demonstrated that it is possible and desirable for the Attorney General to obtain verifiable information establishing a history of drug use as it relates to § 922(g)(3). It follows then that Congress has the ability, as well as the constitutional mandate, to abandon § 922(g)(3) or amend it so an ordinary person understands its proscription and ensures against arbitrary enforcement. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).

From legislative history it is clear that Congress intended to bar certain classes of people from possessing of a firearm. Yet how to identify these classes, and how one may evaluate their risk of entering these classes, remains unanswered. *e.g. Johnson v. U.S.*, 576 U.S. at 598. (finding the residual clause of the Armed Career Criminal Act void for vagueness and noting the

clause "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony"). "Without knowledge of [their criminal] status, [a] defendant may well lack the intent needed to make [their] behavior wrongful." *Rehaif v. United States*, 139 S. Ct. 2191, 2197 (2019). In its *Rehaif* decision, the Supreme Court held that prosecution under 18 U.S.C. § 922(g) and § 924(a)(2), requires that the government "prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm." *Id.* Scienter requirements, such as the one examined in *Rehaif*, are consistent with the understanding that, underlying criminal law, is the principle of "a vicious will." *Id.* at 2196 (citing 4 William Blackstone, Commentaries on the Laws of England 21 (1769)). Thus, in any case charged under § 922(g)(3) the Government must establish, beyond a reasonable doubt, that the defendant knew he fell within the statute's proscribed class.

Mr. Ledvina demonstrates that the plain language of the statute, congressional history, and judicially created definitions, all fail to provide an individual with notice of their status as an "unlawful user." This exact observation underscores the vagueness problem at the core of § 922(g)(3). Without comprehensible statutory definitions, it is unclear when a person begins, or ends, use of a controlled substance that prohibits possession of firearm. Unless one first knows their status as a prohibited person, they cannot knowingly commit a violation of § 922(g)(3). The constitutional infirmities of § 922(g)(3) are so grave they render the statute meaningless and unenforceable. Because the statutory language of § 922(g)(3) is so vague it fails to provide an ordinary person fair warning about what the law demands of them including whether they fall within a prohibited status under the statute, it must be found unconstitutionally vague.

There is also a fundamental problem with "unlawful user." "Unlawful" specifically modifies "user." A "user" would, of course, be a person who uses an item or thing. "Unlawful

user" would require that the "use" be "unlawful." However, there are no laws that specifically make "use" of a controlled substance "unlawful." Title 21, U.S.C., § 841 is the primary law criminalizing acts relating to controlled substances . Section 841(a) criminalizes manufacturing, distributing, dispensing, and possessing with the intent to manufacture, distribute or dispense a controlled substance. It does not criminalize the "use" of a controlled substance. The only context in which § 841 employs "use" is with respect to sentence enhancements "if death or serious bodily injury results from the use of such substance." Title 21, U.S.C., § 844 criminalizes the possession of controlled substances, but does not regulate the "use" of controlled substances either. Likewise, Iowa Code § 124.401, covering prohibited acts relating to controlled substances criminalizes manufacturing, delivering, and possession with the intent to manufacture or deliver. It does not criminalize "use." Thus, under neither federal nor Iowa law is the "use" of a controlled substance "unlawful." How is a user of controlled substances to know that their "use" is "unlawful?"

b. Judicial attempts to salvage § 922(g)(3) violate the Separation of Powers.

In *Davis,* the Supreme Court rejected the notion of judicial intervention aimed at saving a vague law. *See Davis,* 139 S. Ct. at 2323 ("Only the people's elected representatives in Congress have the power to write new federal criminal laws"). In part, this mandate exists to "[guard] against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges." *Sessions v. Dimaya*, 138 S. Ct. at 1212.

As examined above, both the plain language of the statute, as well as legislative history of § 922(g)(3), fail to provide insight into exactly which class of people Congress intended to

exclude from those who may exercise their Second Amendment rights. There is nothing contained within the statute, or history, to support the judicially created definitions of "addicted to" and "unlawful user." Section 922(g)(3) may only be rectified, as it relates to a void for vagueness challenge, through congressional action addressing the statutory deficiencies. Congress' decision not to do so, especially when it has taken steps to clarify similar terms in other contexts, is not an invitation to the courts to abandon judicial restraint. *Davis,* 139 S. Ct. at 2333. The continued attempts to judicially define and salvage § 922(g)(3) are not only futile, they are an unconstitutional violation of the Separation of Powers doctrine. As such, the statute, as written by Congress, must be stricken as void for vagueness.

c. Section 924(a)(1)(A) is also facially void because the text is ambiguous

Title, U.S.C., § 924(a)(1)(A) provides:

> (1) Except as otherwise provided in this subsection, subsection (b), (c), (f), or (p) of this section, or in section 929, whoever—
>
> > (A) knowingly makes any false statement or representation with respect to the information required by this chapter to be kept in the records of a person licensed under this chapter or in applying for any license or exemption or relief from disability under the provisions of this chapter;
> >
> > . . .
>
> shall be fined under this title, imprisoned not more than five years, or both.

The Superseding Indictment alleges that Mr. Ledvina made a false statement that he was not an "unlawful user" of controlled substances. The same analysis as set forth above with respect to "unlawful user" as used in Section 922(g)(3) applies with equal force to this statute. Section 924(a)(1)(A) is also unconstitutionally vague.

d. **To the Extent That There is Any Ambiguity, the Rule of Lenity Applies**

"To the extent doubt persists at this point about the best reading of the [statute], a venerable principle supplies a way to resolve it. Under the rule of lenity, this Court has long held, statutes imposing penalties are to be "construed strictly" against the government and in favor of individuals [such as Defendant]." *Bittner v. United States*, 598 U.S. ___, 143 S.Ct. 713 (2023) (citing *Commissioner v. Acker*, 361 U. S. 87, 91 (1959). "[T]he rule of lenity's teaching [is] that ambiguities about the breadth of a criminal statute should be resolved in the defendant's favor. That rule is "perhaps not much less old than" the task of statutory "construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95, 5 L.Ed. 37 (1820) (Marshall, C.J.). And much like the vagueness doctrine, it is founded on "the tenderness of the law for the rights of individuals" to fair notice of the law "and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department." *Ibid.*; [citation omitted]. Applying constitutional avoidance to narrow a criminal statute, as this Court has historically done, accords with the rule of lenity. By contrast, using the avoidance canon instead to adopt a more expansive reading of a criminal statute would place these traditionally sympathetic doctrines at war with one another." *United States v. Davis*, __ U.S. __, 139 S. Ct. 2319, 2333 (2019).

For the reasons stated above, "unlawful user" is impermissibly vague. Under the rule of lenity, it must be strictly construed against the Government.

II. Section 922(g)(3) Unconstitutionally Infringes on an Individual's Right to Bear Arms Under the Second Amendment.

The Second Amendment to the United States Constitution "confer[s] an individual right to keep and bear arms." *District of Columbia v. Heller*, 554 U.S. 570, 595 (2008). This right "shall not be infringed." U.S. CONST. amend. II. The right to keep and bear arms is

fundamental, applicable against state and local governments, and entitled to the same protections as other fundamental rights enshrined in the Constitution. *See, McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010). Still, Congress passed § 922(g)(3), a law that strips citizens of rights guaranteed to them by the Second Amendment without any historical precedent. The criminalization of the possession of firearms falls within the scope of the Second Amendment. Thus, the blanket prohibition on firearm possession by those who are unlawful users of or addicted to a controlled substance is unconstitutional under the Supreme Court's new *Bruen* analysis.

After, the United States Supreme Court's *Heller* decision in 2008, "most federal appellate courts applied a two-step framework using a means-ends analysis to determine the constitutionality of § 922(g) restrictions on Second Amendment rights." *U.S. v. Jackson*, CR-22-59-D – Order dated 8/19/2022 (**ECF #45). However, in *New York State Rifle and Pistol Association v. Bruen*, 142 S. Ct. 2111 (2022), the Court adopted a new standard for determining the constitutionality of regulation based on the Second Amendment. The Court stated,

> When the Second Amendment's plain text covers an individual's conduct, the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with this Nation's historical tradition of firearm regulation.

Id. at 2129-30.

Therefore, the first step in the Court's analysis is to determine whether the plain text of the Second Amendment covers a defendant's conduct.

a. The Second Amendment's plain text covers conduct at issue in § 922(g)(3).

In *Bruen*, the Court stated that the Second and Fourteenth Amendments "protect an individual's right to carry a handgun for self-defense outside the home." *Id.* at 2122. The

decision further acknowledged "that the right to "bear arms" refers to the right to "wear, bear, or carry…upon the person or in the clothing or in a pocket, for the purpose…of being armed and ready for offensive or defensive action in a case of conflict of another." *Id*. at 2134. (quoting *Muscarello v. U.S.*, 524 U.S. 125, 143 (1998)). Section 922(g)(3) is a complete bar on firearm possession. It is not limited by the type of firearm or the purpose for which the firearm might be used. Nor is it limited to firearms possessed in a particular public area. It applies with equal force to firearms kept in the home for self-defense. A person's ability to possess a firearm for self-defense is the central component of the Second Amendment right. Thus, the conduct of any individual charged under this statute is clearly covered by the plain text of the Second Amendment.

In *Owens*, this Court found that this part of the *Bruen* test is met. This Court reasoned that the Second Amendment protects the right of the "people" to possess firearms and that the plain text of the Second Amendment protects the right of any person protected by the Constitution to possess firearms, without regard to whether they are "law-abiding." *See Owens*, slip op. at 2-4. Mr. Ledvina is a person protected by the Constitution and, therefore, part of the "people" protected by the Second Amendment's right to possess a firearm.

b. The Government cannot meet its burden to show that § 922(g)(3)'s restrictions are "consistent with the Nation's historical tradition of firearm regulation."

The second step of the *Bruen* analysis places the burden on the government to demonstrate that the regulation is consistent with the "Nation's historical tradition of firearm regulation." Under *Bruen's* new model, disarmament laws that address persistent social problems require evidence that similar provisions existed at the time of ratification. "[W]hen a challenged regulation addresses a general societal problem that has persisted since the 18th century, the lack

of a distinctly similar historical regulation addressing that problem is relevant evidence that the challenged regulation is inconsistent with the Second Amendment." *Bruen* at 2131. With this understanding, the government clearly cannot meet its burden to show that the Nation's history, particularly around the passage of the Second Amendment, supports firearm restrictions for those addicted to, or who unlawfully used, a controlled substance.

As in *Heller* and *Bruen*, historical examples of regulations offered by the government must be "distinctly similar" to § 922(g)(3) because the restriction does not address "unprecedented societal concerns or dramatic technological changes[.]" *See Bruen*, 142 S. Ct. at 2132–33. There are no "distinctly similar" regulations from the founding. Indeed, the history of barring firearm possession by those who use or are addicted to controlled substances (or narcotics in general) is limited and relatively recent. Congress first passed § 922(g)(3) in 1968. *See* Gun Control Act of 1968, Pub. L. 90–618, 82 Stat. 1213 (codified at 18 U.S.C. § 921 *et seq*.). *Bruen* requires looking at the state of the law at the time the Second Amendment was adopted. The Court cannot look at evolving, and substantially later, concepts of persons whom society might consider "dangerous" for some reason and who therefore should be precluded from possessing firearms.

1968 was the first time in the Nation's history that Congress enacted such a ban on unlawful users of controlled substances possessing firearms. The government cannot rely on the passage of a mid-twentieth century statute to establish a long-standing historical tradition dating back to the enactment of the Second Amendment. *See Bruen*, 142 S. Ct. at 2137. In fact, the Supreme Court specifically declined to consider any twentieth century evidence offered by the respondents in *Bruen*, noting it "does not provide insight into the meaning of the Second Amendment when it contradicts earlier evidence." *Id.* 142 S. Ct. at 2154, n. 28.

Nor can the Government rely on the general pronouncement by the Supreme Court in *Heller* that presumptively lawful regulatory measures include: "prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions and qualifications on the commercial sale of arms." *Heller* at 626-27. That list does not include those who are accused of being an unlawful user of a controlled substance. Those regulations would not be "distinctly similar" to § 922(g)(3) to address a "general societal problem." Even if § 922(g)(3) were a uniquely modern regulation, such that the Court could expand its historical analysis to include merely similar historical analogues, those longstanding regulations are not "relevantly similar" because they do not impose a comparable burden or evince comparable justifications. *See Bruen*, 142 S. Ct. at 2132-33. While the examples provided by the Court in *Heller* were not exhaustive, they generally all comport with a historical principle of disarming select groups for the sake of public safety. *See NRA*, 700 F.3d at 200-01 (citing Saul Cornell, *Commonplace or Anachronism: The Standard Model, the Second Amendment, and the Problem of History in Contemporary Constitutional Theory*, 16 Const. Comment. 221, 231–36 (1999)). There is no comparable "public safety" justification for disarming all drug users. Moreover, the Supreme Court has since explained that the "government may not simply posit that the regulation promotes an important interest." *Bruen*, 142 S. Ct. at 2126. Therefore, the Government cannot rely on general public safety justifications to uphold § 922(g)(3).

This Court's Order in *Owens* sweeps too broadly. The issue is not whether, at the time the Second Amendment was adopted, persons who were considered "dangerous" were prohibited from possessing firearms. The issue is whether, at the time the Second Amendment was adopted, persons who were "unlawful users" of controlled substances were prohibited from

owing firearms or were considered sufficiently "dangerous" that they should be prohibited from possessing firearms. The cases in other Districts finding that § 922(g)(3) violates the Second Amendment provide the proper view of how *Bruen* is to apply. *See, e.g.*, *United States v. Connelley*, Cause No. EP-22-CR-229(2)-KC, 2023 WL 2806324, at *12 (W.D. Tex. Apr. 6, 2023); *United States v. Harrison*, Case No. CR-22-00328-PRW, 2023 WL 1771138, at *24 (W..D. Okla. Feb. 3, 2023).

In *Owens*, this Court relied heavily on the Eighth Circuit's opinion in *United States v. Seay*, 620 F.3d 919, 925 (8th Cir. 2010). *Seay*, decided after *Heller*, but before *Bruen*, rejected a facial constitutional challenge to § 922(g)(3). *Seay*, however, does not apply the proper Constitutional analytical framework set forth in *Bruen*. As *Seay* is effectively overruled by *Bruen*, *Seay* need not be followed by this Court. An Eighth Circuit precedent that is inconsistent with subsequent United States Supreme Court opinions is no longer binding authority. *See United States v. Watson*, 623 F.3d 542, 544 (8th Cir. 2010); *United States v. Williams*, 537 F.3d 969, 975 (8th Cir.2008) ("Although one panel of this court ordinarily cannot overrule another panel, this rule does not apply when the earlier panel decision is cast into doubt by a decision of the Supreme Court.") (emphasis and citation omitted). The Eighth Circuit applied the historical analysis required by *Bruen* when upholding 18 U.S.C. 933(g) (1) in *United States v. Jackson*, 69 F.4th 495, 502-6 (8th Cir. 2023). By applying the historical analysis laid out in *Bruen* rather than the reasoning of *Seay*, the Eighth Circuit has recognized its analytical approach used in *Seay* has been abrogated by *Bruen*.

Even if this Court finds that § 922(g)(3) does not violate the Second Amendment on its face, the statute should not apply to a person like Mr. Ledvina, who was merely found with a controlled substance and who has no criminal history of using controlled substances. This set of

circumstances is not "distinctly similar" or even "relevantly analogous" to founding era prohibitions on the right to bear arms. Though intoxicants existed at the founding, the government cannot establish that eighteenth century history supports stripping a man of his ability to defend himself because he possessed an intoxicant. Because the Government cannot establish that § 922(g)(3) is consistent with the Nation's historical tradition of firearm regulation, it violates the Second Amendment facially and as applied to Mr. Ledvina.

CONCLUSION

Section 922(g)(3) is unconstitutionally vague on its face and fails to give adequate notice of the conduct it prohibits. Further, it impermissibly restricts a person from exercising their right to defend themselves, their families, and their homes. Because there is no historical precedent to support the regulation, the provision is unconstitutional and the Indictment against Mr. Ledvina should be dismissed.

Respectfully submitted,

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